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LUCIANA BAKER Plaintiff, Vs. THE HARTFORD LIFE INSURANCE COMPANY, and BLOOMBERG, LP – NEW YORK, ADMINISTRATOR OF THE BLOOMBERG LP LONG-TERM DISABILITY PLAN Defendant,	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CIVIL ACTION NO. 08-cv-6382 (FLW)

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The following timeline will be helpful in demonstrating Hartford's flawed approach to its administration of Plaintiff's Long Term Disability Claim:

August 3, 2007: Plaintiff's Employer, Bloomberg, completes a "Physical Demands Analysis" regarding Plaintiff's job.

August 22, 2007: Plaintiff completes an application form for long term disability benefits.

August 28, 2007: Plaintiff's primary treating doctor, Paul M. Cooke, M.D., completes an Attending Physician's Statement indicating Plaintiff's medical restrictions.

January 17, 2008: Plaintiff appeals the denial of her long term disability claim including information regarding the required duties of her job and multiple medical reports.

March 17, 2008: Hartford denies Plaintiff's appeal based upon the content of the employer's August 3, 2007 Physical Demands Analysis.

The uncontroverted facts are that Hartford never recontacted Plaintiff's employer after her January, 2008 Administrative Appeal. Rather, Hartford denied the appeal by resorting to information contained on a form which the employer submitted before the Plaintiff provided any information whatsoever concerning her medical restrictions and limitations.

PRELIMINARY STATEMENT

The Motion for Summary Judgment filed on behalf of The Hartford Life Insurance Company ("Hartford") reveals an approach which is significantly flawed. To begin with, the "reasoning" for the denial as expressed in Hartford's Motion vastly expands the explanation for the denial of Ms. Baker's claim which was written in both its initial denial letter dated September 14, 2007, as well as its appeal denial of March 17, 2008. The purported reasons for the denial now expressed in Hartford's Motion represent a *post hoc* creation of counsel.

The second major flaw revealed by Hartford's Motion is that it virtually ignored key information contained in Ms. Baker's appeal. The key information involves both medical, and also vocational information.

From a medical standpoint, Hartford dismissed the opinions of an entire team of medical specialists by accepting as determinative a single short conclusory and erroneous statement by its medical consultant, Dr. Nemunaitis. (Hartford's Motion suggests that it also dismissed the information because it was "new". However, that idea was never even mildly suggested in the appeal denial letter. It is also factually incorrect).

From a vocational standpoint, Hartford's Motion shows that it continued to rely upon its own self-serving interpretation of ambiguous language contained in a form which was filled out and submitted by Ms. Baker's employer, Bloomberg, LP ("Bloomberg"). Hartford relied on the form in concluding that Ms. Baker's medical condition could be accommodated. In her appeal Ms. Baker explained why it could not. The real problem is not just that Hartford relied upon its own self-serving interpretation of the language on Bloomberg's form, but that it did so even after

Ms. Baker clarified her job and explained why her work station could not be modified to accommodate her medical problems, without even recontacting Bloomberg. In other words, after Ms. Baker submitted detailed medical evidence and information about her specific job duties, Hartford simply chose to retreat back to a form submitted by Bloomberg that actually predated all of the medical information supplied to Hartford.

LEGAL ARGUMENT

I. CONTRARY TO HARTFORD'S CLAIM, PLAINTIFF'S EMPLOYER NEVER "MADE IT CLEAR" THAT PLAINTIFF'S WORK STATION COULD BE MODIFIED.

In support of its Motion for Summary Judgment, Hartford argues that Bloomberg "made it clear" that Plaintiff's work station could be modified. (See Defendant's Brief in Support of its Motion for Summary Judgment, p. 4. "Bloomberg has made clear it can accommodate the sitting restrictions imposed by Dr. Cooke.") See also Defendant's Brief in Support of its Motion for Summary Judgment p.14. In fact, the response on Hartford's Questionnaire submitted by Bloomberg is anything but clear. Not only is the language on the form ambiguous, but it was (1) completed and submitted by Bloomberg without any reference whatsoever to Plaintiff's actual medical condition, and (2) actually submitted ***before Plaintiff submitted any medical documentation supporting her disability claim.***

The document referenced is a "Physical Demands Analysis" submitted by an individual in Bloomberg's Human Resource Department. (It is not completely clear that this document even relates to the Plaintiff. The initial name on the form which appears to have been subsequently crossed out is "Melanie Feitoler" and the job title written on the form is "Multi-Media Reporter.")

There is absolutely no information whatsoever on the form concerning what Ms. Baker's physical/medical condition is. As a matter of fact, the form is directed strictly to the job, not the individual. Seen in this light, Bloomberg's responses shed very little light on whether the job can be modified to meet her specific medical restrictions and limitations.

The specific information on the form that relates to the job is as follows:

"Question: How can this job be modified and for how long?

Answer: The work station can be modified regarding sitting v. standing ratio."

Below that, there is a section entitled "Work Schedule for Job" which indicates that the job is a nine hour per day job.

Immediately beneath the work schedule, there is a section entitled "Sitting/Standing/ Walking Requirements". There, the HR department very clearly indicates that the job requires sitting for seven hours per day one hour at a time. And, beneath that, a check mark is placed in the "yes" box after the question "Alternate sitting and standing as needed?"

However, the "as needed" terminology is extremely ambiguous within the context of an evaluation of Ms. Baker's disability claim. Most likely, Bloomberg was simply indicating that the worker alternates sitting and standing as the job duties require, e.g. walking to get a file, go to a fax machine, confer with another individual, etc. This is a reasonable interpretation given the fact that immediately above the question there are two charts where Bloomberg indicates how long per day and how long at a time the job required sitting and standing. Therefore, Hartford's interpretation that Bloomberg's answer means that Bloomberg felt that Ms. Baker could alternate sitting and standing within the medical restrictions and limitations opined by her team of physicians is unjustified and highly self-serving.

Hartford is attempting to read into Bloomberg's responses that somehow Ms. Baker would not have to sit seven hours a day and not have to sit at least one hour at a time. While the form indicates that the "ratio" of sitting versus standing can be modified, the information on the "Physical Demands Analysis" falls far short of demonstrating that the work station can be modified to fit Ms. Baker's specific medical restrictions and limitations as described by her doctors. The form does not even state how and to what extent the "sitting v. standing ratio" could be modified.

And, it is telling that Hartford continues to rely upon a vague and ambiguous "Physical Demands Analysis" submitted on August 3, 2007 after Ms. Baker submitted an appeal including a detailed description of how and why the attempted job modifications did not work and Harford never bothered to re-contact Bloomberg in order to re-evaluate the issue. In other words, Hartford completely disregarded the information Ms. Baker provided in her appeal.

What Hartford needed to do – and what any reasonably intelligent person would do – was to take the medical reports provided by Ms. Baker and submit them to Bloomberg's Human Resources representative and simply ask if the job could be modified to accommodate those restrictions and limitations. Or, another approach would be to take Ms. Baker's explanation of why she could not perform her job even with the attempted accommodations and see if Bloomberg's HR representative agreed. There could be other approaches as well. But the approach taken by Hartford, i.e., ignore the information submitted with the appeal and fall back on a ambiguous form submitted by an individual with no knowledge of Ms. Baker's medical condition seems particularly insufficient.

Most importantly, however, Hartford is pretending that Bloomberg reviewed Plaintiff's specific medical condition including her specific restrictions and limitations while it was filling out the "Physical Demands Analysis." However, that is simply not the case. The "Physical Demands Analysis" was submitted by Bloomberg after Ms. Baker submitted her disability claim and **before** the medical information was supplied by her doctors. This is easy to see because the "Physical Demands Analysis" is dated August 3, 2007 and the first medical information supporting Plaintiff's claim, the Attending Physician Statement submitted by Dr. Cooke, is dated August 28, 2007 and refers to the last office visit of August 22, 2007.

Regardless of the standard of review, it is clear that Hartford's deliberate attempt to paint a false picture by using the August 3, 2007 Physical Demands Analysis cannot be sustained. What makes it worse here is that after Ms. Baker went to great lengths to explain her specific job duties and why they could not be performed given her disabilities Hartford refused to again contact Bloomberg in order to clarify the issue.

II. THE BASIS FOR DENIAL NOW EXPRESSED IN HARTFORD'S MOTION SHOULD BE DISREGARDED AS AN IMPROPER POST HAC RATIONALIZATION.

The basis for denial expressed by Hartford in its March 17, 2008 letter was short and to the point. With respect to Ms. Baker's neurogenic bladder, related urinary problems and vascular problems, the basis for the denial is limited to the adoption of a single sentence by its consultant, Dr. Nemunaitis. In the March 17, 2008 denial letter Hartford's Appeal Specialist writes as follows:

> "We referred the medical information to a medical consultant and are in agreement with the assessment rendered. It was noted by Dr. Nemunaitis that 'based on documentation provided, the medical information does not support the need for restrictions/ limitations."

On the second page of the letter Hartford writes that:

> "We concur with the medical consultant's assessment who also stated that the physician's recommended restrictions/limitations are primarily based on self reported findings. Dr. Nemunaitis further stated that the 'findings do not objectively validate that the claimant could sit maximally for 30 minutes.'"

There is no dispute about the fact that there are no other expressed reasons for Hartford's denial of Ms. Baker's claim as it relates to her neurogenic bladder, related urinary problems and vascular problems. There is absolutely nothing written by either Dr. Nemunaitis or Hartford's Appeal Specialist about why the information provided by Dr. Fantini, Dr. Ma, Dr. Busono, Dr. Dashevsky, Dr. Schwartsman and Dr. Hsueh was disregarded. Most significantly, however, the statement provided by Dr. Nemunaitis in the report that was adopted by Hartford is categorically and plainly wrong. In the report Dr. Nemunaitis writes that "There were no restrictions/ limitations associated with the claimant's comorbid conditions that included venous insufficiency and urinary retention." (TJH Cert. Ex. 13, pg. 2) However, Dr. Dashevsky and Dr. Hsueh plainly opined that there ***were*** restrictions and limitations due to these conditions.

It is important to note that this is not a case where Hartford's consultant disagreed with Plaintiff's treating physicians. Rather it is a case where he either misstated or simply ignored the opinions of Ms. Baker's treating physicians.

Hartford now attempts to argue in its Motion that "Plaintiff's conduct demonstrates that she is not disabled from her own occupation", (Defendant's Brief p. 8), and, "The opinion of Dr.

Wang (sic) is insufficient to satisfy Plaintiff's burden of proof." (Defendant's Brief p. 17) However, neither of those statements appear in any way in either the initial denial letter or the appeal denial letter. In short, they represent *post hoc* justifications which, while intended to bolster Hartford's decision, actually demonstrate that it was arbitrary and capricious.

Post hoc justifications of this nature have been universally criticized and rejected. See e.g. Skretvedt v. E.I. Dupont DeNemours and Co., 268 F.3d 167, 178, n. 8 (3d Cir. 2001). ("We take this opportunity, however, to underscore the importance of pension boards providing specific reasons for denying applicants' benefits claims, both so that the applicants may introduce the proper evidence on appeal and so that a federal court may exercise meaningful review.").

As the court explained in Skretvedt, citing University Hospitals of Cleveland v. Emerson Electric Co., 202 F.3d 839 (6th Cir. 2000), it "…strikes us as problematic to, on the one hand, recognize an administrator's discretion to interpret a Plan by applying a differential 'arbitrary and capricious' standard of review, yet, on the other hand, allow the administrator to 'shore up' a decision after – the – fact by testifying as to the 'true' basis for the decision after the matter is in litigation, possible deficiencies in the decision are identified, and an attorney is consulted to defend the decision by developing creative *post hoc* arguments that can survive deferential review…"

This issue was also addressed in Doyle v. Nationwide Ins. Companies. 240 F.Supp. 2d 328 (E.D. Pa. 2003). There, the Court noted that, "It is the Administrator's obligation to provide its 'specific reasons' for the denial. Id. Without knowing the specific reasoning behind the Administrator's decision, the Plaintiff was at a significant disadvantage in framing a response on appeal. This is the precise conduct condemned by the Third Circuit in Skretvedt, 268 F.3d at 177

n. 8 and it weighs in favor of finding that the Administrator's decision was arbitrary and capricious." Doyle, supra at 345.

In Doyle, supra at 347, the Court made a further observation, directly applicable to the instant case, that the Defendants attempted to explain the Administrator's decision in their moving papers with "several justifications that were never offered to Plaintiff prior to the instant litigation." Doyle, supra. at 347.

After referencing both the Skretvedt and University Hospitals of Cleveland decisions, the Court, in Doyle, wrote that "The Court shares this concern and notes that permitting an Administrator's *post hoc* rationale to prevail when a claimant seeks review in Federal Court would undercut ERISA's requirement that Administrator's provide 'specific reasons' from the outset when denying a claim for benefits. See 29 U.S.C. § 1133(1). Moreover, it would unduly stretch the latitude granted to Administrator's decisions reviewed by federal courts under the already deferential 'arbitrary and capricious' standard of review. Accordingly, in light of these policy concerns and the Third Circuit's counsel, the Court will decline to consider the Administrator's *post hoc* rationales in this case." Doyle supra at 347.

Here, just as in Doyle, supra the Defendant has attempted in their memoranda and affidavits to attempt to explain the Administrator's decision with a number of justifications never before offered to Plaintiff prior to litigation. For example, Hartford *now* seeks to bolster its decision by presumably challenging Plaintiff's credibility by noting that she traveled to Brazil. See Defendant's Statement of Uncontested Material Facts, para. 30, 41; Defendant's Brief in Support of its Motion for Summary Judgment, pg. 19. In its brief, Hartford argues that Ms. Baker's complaints of pain with long sitting are inconsistent with the fact that she traveled to Rio de Janeiro on numerous occasions. Hartford also argues that Plaintiff's complaints are inconsistent with her exercise sessions.

These arguments underscore the danger of these *post hoc* rationalizations and why they are most worthy of condemnation. Had Hartford ever raised these issues before, Ms. Baker could have explained that she needed to visit her family and that her exercise program was strictly in accordance with the recommendations of her physicians.

Additionally, Hartford now attempts to argue that in Ms. Baker's initial claim she only mentioned her back problem and not her other medical problems, e.g., neurogenic bladder. To begin with, Hartford is actually wrong because in Plaintiff's application for short term disability benefits, she indicated that her problems resulted from "spinal related diseases." (HLI00293) And, in a lengthy Addendum affixed to her initial application for Long Term Disability Benefits, Ms. Baker clearly expressed that, "after approximately 20 minutes of sitting "my legs get numb, tingling, cold …" Therefore, Ms. Baker did in fact indicate that her symptoms included numbness, tingling and coldness. (HLI00215) These, of course, are spinal related problems as explained by Ms. Baker's team of specialists.

However, this present argument, just like the argument about the insufficiency of the opinion of Dr. "Wang", and the argument about Plaintiff's current activities was never before expressed in any denial letter and represents a after-the-fact creation of counsel in an effort to bolster the unsupportable determination of Hartford.

Respectfully Submitted,
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DATED: October 14, 2009

BY: ______________________
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